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FILED
JUN 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1286

IN THE

Supreme Court of the United States

W.R. GRACE & CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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June 10, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

This Court's fractured decision in *United States v. Santos*, No. 06-1005 (Slip op. June 2, 2008)—announced on the very day that petitioners in this case and a companion case, *Eschenbach v. United States*, No. 07-1287, filed their reply briefs—underscores that this Court's review is warranted here. *Santos* unsettled the law on the rule of lenity, and this case, in which the Ninth Circuit interpreted the word "Asbestos" in 42 U.S.C. § 7412(b) to sweep far more broadly in the criminal context than the EPA has interpreted that word in the regulatory context, provides this Court with a perfect vehicle to restore clarity to this important area.

Santos presented the question whether the term "proceeds" in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1), means "receipts" or "profits." Applying the rule of lenity, a majority of this Court held that it means "profits," and accordingly affirmed the decisions below vacating the *Santos* respondents' convictions. *See* Slip op. 16-17 (Scalia, J., joined by Souter, Thomas, and Ginsburg, JJ.); *id.* at 5 (Stevens, J., concurring in the judgment).

This Court splintered, however, on the reasons that the rule of lenity applied, and the scope of its application. The plurality concluded that the undefined statutory term "proceeds" could mean either "receipts" or "profits," and hence "[u]nder a long line of our decisions, the tie must go to the defendant." Slip op. 6 (plurality); *see also id.* ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."); *id.* ("This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose

commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead."). According to the plurality (in a part of its opinion not joined by Justice Thomas), if the term "proceeds" in § 1956(a)(1) is ambiguous, then it is ambiguous in *all* applications, and the more defendant-friendly interpretation must be applied in *every* context. *See id.* at 14-16.

Justice Stevens agreed with the plurality that the rule of lenity applied in *Santos*, but for different reasons and to a different extent. According to Justice Stevens, the rule of lenity applied given "both a lack of legislative history speaking to the definition of 'proceeds' when operating a gambling business is the 'specified unlawful activity' and my conviction that Congress could not have intended the perverse result that would obtain in this case under [the principal dissenting] opinion." *Id.* at 5 (Stevens, J., concurring in judgment); *see also id.* at 5 n.7 ("[M]y conclusion rests on my conviction that Congress could not have intended the perverse result that the dissent's rule would produce if its definition of 'proceeds' were applied to the operation of an unlicensed gambling business."). Thus, according to Justice Stevens, the more defendant-friendly interpretation of the term "proceeds" applied in *Santos* need not be applied in *every* factual context. *See id.* at 3 n.3, 5 & n.7.

Justice Stevens' opinion drew a spirited response from the plurality. According to the plurality, "JUSTICE STEVENS' position is original with him;

neither the United States nor any amicus suggested it; it has no precedent in our cases." *Id.* at 15 (plurality). According to the plurality, "the same word, *in the same statutory provision*," cannot have "different meanings *in different factual contexts*." *Id.* (emphasis in original). That approach, the plurality insisted, could not be squared with *Clark v. Martinez*, 543 U.S. 371 (2005), in which the Court stated that "our cases often 'give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. *The lowest common denominator, as it were, must govern.*'" *Id.* (quoting *Martinez*, 543 U.S. at 380) (emphasis added by *Santos* plurality).

Justice Stevens, however, gave *Martinez* a far narrower interpretation, stating that "[i]n *Martinez* there was no compelling reason—in stark contrast to the situation here—to believe that Congress intended the result for which the Government argued." *Id.* at 5-6 n.7 (Stevens, J., concurring). Accordingly, Justice Stevens insisted that applying the rule of a lenity to a particular statutory term in one context did not necessarily compel applying the rule of lenity to that term in every context. *See id.*

The plurality then went out of its way to address "the *stare decisis* effect of JUSTICE STEVENS' opinion." *Id.* at 16 (plurality). According to the plurality, the effect of Justice Stevens' opinion was to limit the holding in *Santos* to the proposition "that 'proceeds' means 'profits' when there is no legislative history to the contrary," but not to "hold that the outcome is different when contrary legislative history does

exist." *Id.* Under this view, the state of the law post-*Santos* is that "counsel remain free to argue JUSTICE STEVENS' view (and to explain why it does not overrule *Clark v. Martinez*, *supra*)," but "should be warned, ... [that] [n]ot only do the Justices joining this opinion reject that view, but so also (apparently) do the Justices joining the principal dissent." *Id.* Indeed, the principal dissent was explicit on this score: "I cannot agree with JUSTICE STEVENS's approach insofar as it holds that the meaning of the term 'proceeds' varies depending on the nature of the illegal activity that produces the laundered funds." *Id.* at 2 (Alito, J., joined by Roberts, C.J., and Kennedy and Breyer, JJ., dissenting)); *id.* at 17 ("[C]ontrary to the approach taken by JUSTICE STEVENS, I do not see how the meaning of the term 'proceeds' can vary depending on the nature of the illegal activity that produced the laundered funds."). Justice Stevens, in turn, rejected the plurality's discussion of the *stare decisis* effect of his concurrence as "the 'purest of dicta.'" *Id.* at 5 n.7 (Stevens, J., concurring in the judgment) (quoting *id.* at 16 (plurality)).

This case gives the Court an opportunity to clarify the rule of lenity issues that are now unsettled in the wake of *Santos*. This case, like *Santos*, involves the meaning of an undefined statutory term—the term "Asbestos" in 42 U.S.C. § 7412(b). As the Ninth Circuit explained, "[t]he government contends that a statute may have two definitions for one term, one definition civil and one criminal." Pet. App. 16a. But because the criminal "knowing endangerment" provision of the Clean Air Act expressly cross-references the list of hazardous air pollutants subject to regulation by the EPA, *see* 42 U.S.C.

§ 7413(c)(5)(A), it follows under *Martinez* that the term "Asbestos" should have the same meaning in § 7412(b) as in § 7413(c)(5)(A).

Indeed, petitioners cited *Martinez* for just this proposition in the Ninth Circuit: "It is axiomatic ... that a single word or phrase in a statute with both civil and criminal applications has the *same* meaning in both contexts. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380-81 (2005)." Appellees' Joint Resp. Br., CA9 Nos. 06-30472, 06-30524 (filed 3/21/07), at 34 (emphasis in original); *see also id.* at 35 ("[T]he single cross-referenced word "asbestos" in § 7412 of the Clean Air Act cannot have a different meaning in the civil context and the criminal context."). In its reply brief, the Government tried to distinguish *Martinez* on the ground that "[t]hat case involved two different constructions of a *single* ambiguous statutory provision," whereas "[t]he instant case involves *two* different provisions from a statute and a regulation." Reply Br. of the United States, CA9 Nos. 06-30472, 06-30524 (filed 4/3/07), at 7 (emphasis modified). But that is simply not true: both the EPA's regulation and the criminal "knowing endangerment" provision involve the single word "Asbestos" in § 7412(b); that term appears just once, not twice, in the statute.

The Ninth Circuit, however, turned the Government's argument into a holding that "Congress validly may create multiple enforcement mechanisms that each draw on *different definitions* for the same term or phrase." Pet. App. 18a (emphasis added); *see also id.* at 19a ("We defer to Congress's decision to create two enforcement structures and hold the district court's conflation of

the two to be error."). As explained in the petition, that holding turns the rule of lenity upside down, holding that a single statutory term may be given a more *prosecution*-friendly meaning in the criminal context than in the civil context. *See* Pet. 9-14.

This case thus presents this Court with a chance to clarify whether its fractured decision in *Santos* marks a change in the law, or whether *Martinez* remains good law. *Martinez* firmly rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases," 543 U.S. at 386, which is precisely what the Ninth Circuit did here. Statutory terms are not "chameleon[s]," *id.* at 382, to be given different meanings in different contexts, and the word "Asbestos" cannot mean one thing in § 7412(b) and something else when incorporated by cross-reference into § 7413(c)(5)(A). "If anything," as the *Santos* plurality explained, "the rule of lenity is an additional reason to remain consistent, lest those subject to the criminal law be misled." *Santos*, Slip op. at 16 (plurality). This case proves that point in the starkest of terms: individuals and businesses subject to the Clean Air Act are entitled to conclude that "Asbestos" within the meaning of § 7412(b) means what the EPA says it means, and not face criminal prosecution for releasing substances that the EPA has excluded from the definition of "Asbestos" under § 7412(b). Given the debate between the plurality and the concurrence in *Santos* on that decision's precedential effect, and the meaning of *Martinez*, this Court should grant review here to clarify those issues.

And wholly apart from those issues, not a single Justice in *Santos* concluded, as the Ninth Circuit did here, that a particular defendant's subjective knowledge renders the rule of lenity inapplicable. *See* Pet. App. 17a ("[D]efendants had actual notice in this case of the risks from the fibrous content of the asbestiform materials in their products. Defendants are an industrial chemical company and seven of its top executives. They are all familiar with asbestos."). Indeed, at least seven Justices in *Santos* expressly rejected the proposition that a particular statutory term could have one meaning when applied to one set of defendants and another meaning when applied to another set of defendants. *See Santos*, Slip op. at 14-16 (Scalia, J., joined by Souter and Ginsburg, JJ.); *id.* at 2, 17 (Alito, J., joined by Roberts, C.J., and Kennedy and Breyer, JJ., dissenting). And even under Justice Stevens' view, the rule of lenity should apply here, because nothing in the legislative history supports the Ninth Circuit's interpretation of the statute, and it is absurd to think that Congress intended the Clean Air Act's criminal "knowing endangerment" provision to sweep more broadly than the Act's regulatory provisions when Congress explicitly defined the former by cross-reference to the latter. *See* 42 U.S.C. § 7413(c)(5)(A). If anything, thus, *Santos* underscores that the Ninth Circuit's opinion below cannot stand.

For these reasons, and those stated in the Petition for Certiorari and Reply to Brief in Opposition, this Court should either summarily reverse the decision below or set the case for plenary review.

June 10, 2008

Respectfully submitted,

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